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In The

Supreme Court Of The United States

NOVEMBER TERM, 1984

STEVEN M. ASHERMAN,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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QUESTIONS PRESENTED

1. Whether the jury's consideration of a dictionary definition of the word "inference" during jury deliberations violated the petitioner's due process right to a fair trial.

2. Whether the jury's performance of an experiment, which introduced into the case no new evidential fact, was conceded below to have been reliable, and was suggested by the conduct of defense counsel at trial, violated the petitioner's due process right to a fair trial.

3. Whether the trial court's instructions to the jury violated this court's holding in the case of Sandstrom v. Montana, 442 U.S. 510 (1979).

4. Whether the limitations placed by the trial court on cross-examination of two state's witnesses violated the petitioner's confrontation and due process.

5. Whether there was sufficient evidence to support the jury's verdict.

6. Whether the consumptive testing performed by the State denied the petitioner his right to due process of law.

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STATEMENT OF THE CASE

On April 29, 1980, the petitioner was convicted of manslaughter in the first degree in the stabbing death of Michael Aranow. The facts upon which the conviction rests are set out in the opinion of the Connecticut Supreme Court:

> On a Saturday evening, July 29, 1978, the defendant and the victim, who were both students at the Columbia Medical School, traveled from the victim's family home in Hastings-on-Hudson, New York, to New Hartford, Connecticut, to take a break from work on a school computer project. They arrived in New Hartford at the country estate of the victim's family between 9:00 and 9:30 p.m. As they drove to the Kingdom Game Club, which adjoins the estate, the victim's brother, Philip, noticed the lights of their automobile from the cabin in which he and a friend, Robert Lawrence Lane (Larry Lane), were staying and decided to find out who was entering the property. They drove to the game club and met the defendant and the victim.
>
> The four young men exchanged greetings and introductions, after which the victim told his brother that he and the defendant were going to the lookout at the top of Jones' Mountain and that they might see them later

that night at Philip's cabin. Because it was a particularly "buggy" night, Philip offered to them some insect spray. The four parted, but neither the defendant nor the victim went to Philip's cabin later that night.

The defendant and the victim proceeded to walk through the woods about one mile until they reached the lookout. Because the night was so dark, the victim had to lead the defendant by the hand. When they arrived at the lookout some unexplained emotion or circumstance, induced perhaps by a mind-altering drug, led the defendant to slay the victim brutally by stabbing him with a knife over 100 times in the face, back, buttocks and left leg, and slashing his throat. Some of the wounds were inflicted post-mortem. The defendant also bit the victim on the upper left portion of his back, over the scapula.

The defendant then attempted to hide the body by moving it, but succeeded in moving it only five and one-half to six feet. He left the scene, covered with blood, looking for some place where he could wash the blood off his clothing. As he walked through the woods, he hid somewhere the knife that he had carried to the scene in a "day pack" and the shirt he was wearing, which was drenched in blood, and came upon a stream or nearby pond, where he attempted to wash the blood from the rest of his clothing. He also smeared silt and dirt all over the front of his jeans.

After day broke, on Sunday morning, he walked down to the home of the victim's uncle, Frank Jones. Jones was awakened at 7:30 a.m. by the defendant's shouts at the front door and the barking of Jones' dogs. Coming to the door in his pajamas, Jones found the defendant, stripped to the waist, clad in blue jeans that were soaking wet. The defendant, who was obviously tense, told Jones that he and the victim had been in the woods when they encountered "two guys with a gun." He had escaped but could not find the victim, and wanted to call the police and the victim's parents right away. Jones, who knew that his nephew was familiar with the woods, wanted to find out more before getting excited and calling the police or the Aranows.

After the defendant mentioned the victim's name, Jones let him into the house. The defendant asked for a drink of water and asked also if he could wash his hands, which he was permitted to do at the kitchen sink. Jones noted that, while the defendant wore no shirt, he had no bruises or insect bites anywhere on the exposed part of his body. He could also observe that the defendant appeared to be on drugs or to have been drinking. In response to Jones' questions about the matter, the defendant said that he thought he and the victim had had a couple of beers.

The defendant went on to tell Jones that the night before, he and the victim were walking to a place on the top of the mountain, where there was a

view, when they were approached by two drunken men, one of whom had a gun. According to the defendant, the men asked the victim and him for something, after which the defendant shoved the man with the gun into the other, and he and the victim ran off into the woods.

Jones and the defendant then proceeded in Jones' automobile up Steele Road and onto Henderson Road to Philip Aranow's cabin in order to see if Michael was there. At the cabin, the defendant requested and was given a shirt to wear. He began to give additional details about what had happened the night before, saying that he had seen a knife one of the men had; that one of the men chased him through the woods for a long time; and that his shirt had been lost as he ran through the woods. The defendant kept repeating that they should call the police. He then went by car with Philip Aranow and Larry Lane to the victim's car and the Kingdom Game Club. Having parked Philip's car on the road to the lookout, they proceeded on foot towards the lookout. Jones had taken his car and gone back down Henderson Road and Steele Road to his home and then up the mountain from the opposite direction.

As the three young men approached the lookout, the defendant, who had been calling out for the victim, fell back from the other two. Jones approached from the other direction and saw the body of the victim lying face down at the lookout. He approached the body while the three

young men remained on the dirt road, tried to find a vital sign, and when he did not, told the others that Michael was dead. Frank Jones left the three young men near the lookout as he went to call the police.

Trooper Joseph Bieluch was the first officer to arrive and hear the defendant's explanation. He noted that the defendant's jeans were extremely dirty and wet, as if smeared with silt from a pond. His jogging shoes were also wet, though his hands and arms were clean. He was wearing his glasses and had no apparent bug bites, scratches or cuts. He had a red substance in the corners of his mouth, which appeared to be blood, and Bieluch detected the foul smell of rancid blood. The trooper believed that the defendant was under the influence of something.

. . .

Later, the defendant was asked to reduce his statement to writing at the New Hartford Town Hall. There, Troopers Robert Terry and Richard Raposa saw spots on the defendant's blue jeans that appeared to be blood. When asked to empty his pockets, the defendant produced a key ring on which a red hair, similar to the victim's, was embedded in blood. The defendant, who was surprised to see the blood and hair, wanted to know how long it would take the lab to determine whether or not it was blood. When Sergeant Henry DesChamps later asked the defendant to describe the assailants, he merely

shrugged his shoulders and gave no answer.

During the interview at Town Hall, Sergeant DesChamps asked the defendant if he had killed the victim. The defendant paused for a few moments and, looking down, said "no." Before he left the New Hartford Town Hall, he shook hands with DesChamps, thanked him for the way he had treated him, and promised to come back some day and tell him what had happened on the hill.

The investigation of the scene began upon discovery of the body and continued for a number of days thereafter. An expert in crime analysis testified that there was no sign of a struggle on the small path leading to the lookout or at the nearby road, but that there was a primary and secondary crime scene at the lookout, and that the body had been lifted five and one-half to six feet from the primary to the secondary scene. He also stated that there would have been no way for two men to drag or otherwise force the victim onto the lookout over the small path without creating some disturbance to the path or the vegetation surrounding it.

Expert dog track evidence was presented by Trooper Andrew Rebmann who handled the bloodhound "Clem." . . . The track demonstrated that the victim had never run from any assailant, but proceeded directly to the lookout.

A wide-ranging search of Jones' Mountain by the state police and over one hundred volunteers with metal detectors, failed to yield evidence that would substantiate the defendant's story. All the ponds were searched by Connecticut state police divers without yielding evidence of the crime.

The mountain, as depicted in state's exhibits A, D, X, and Y, was a rugged area of deep, thick woods and full underbrush.

Agent Robert Spalding, of the FBI laboratory, testified that human blood was found in the knees and surrounding front area of the defendant's blue jeans and was especially apparent on the front inside portion of the jeans. . . .

Other expert testimony indicated that the hair on the key ring originated from the head of the victim and had been embedded in human blood on the defendant's key ring. Finally, Dr. Lester Luntz, a forensic odontologist, testified, after exhaustive comparative analysis that, to a "reasonable degree of dental certainty," the bite mark on the victim's back had been inflicted by the defendant's teeth.

On the basis of this evidence, the defendant was convicted of manslaughter in the first degree; General Statutes § 53a-55; and was sentenced thereon to a prison term of not less than seven years nor more than fourteen.

State v. Asherman, 193 Conn. 695, 697-704, 478 A.2d 227 (1984).

The petitioner appealed his conviction to the Connecticut Supreme Court, which by unanimous decision, affirmed the judgment. Id. at 697. It also rejected the petitioner's motion to reargue, which was followed by this petition for a writ of certiorari.

I. THE PETITIONER HAS NOT MADE A SUBSTANTIAL CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL BY ANY JUROR MISCONDUCT THAT OCCURRED BELOW OR THAT SUCH A CLAIM IS OTHERWISE WORTHY OF REVIEW

A. Facts Relating To the Petitioner's Claim

During the course of jury deliberations, one juror read to the others a definition of the word "inference" that he had copied from a Funk & Wagnall dictionary. The definition read to the jury follows:

> Item 1, that which is inferred; a deduction or conclusion; Two, the act or process of inferring; Three, loosely a conjecture . . .; Fourth, is the comprehensive term for the formal drawing of conclusions; it includes both induction and deduction. Deduction [sic] is the inferring of a universal or general rule from instances. Deduction is the reverse process of drawing a conclusion as to a particular instance from general premises.

Petitioner's App. at 127A. The definition that the petitioner particularly objects to is "loosely, a conjecture."

Another juror brought into the jury room a belt and a shirt, not introduced into evidence as exhibits, in order to use these items in an experiment in which one juror tried to lift another juror lying prone on the floor and carry him five or six feet. The purpose of the experiment, suggested by the conduct of defense counsel during the course of the trial, was to test the plausibility of the State's theory of the case, as well as that proffered by the

petitioner. Petitioner's Brief at 128A, 130A.

B. The Conduct Complained Of Did Not Deprive the Petitioner Of A Fair Trial

The Connecticut Supreme Court's careful treatment of the petitioner's claim discloses that the defendant's right to a fair trial was not violated.[1] The Court first observed that juror misconduct deprives a criminal defendant of a fair trial when it results in "substantial prejudice." Petitioner's App. at 126A. In the absence of conduct that by its nature would create a presumption of prejudice; see, e.g., Remmer v. United States, 347 U.S.

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[1] Although the defendant claims that several constitutional rights were violated by the alleged juror misconduct, Petitioner's Brief at 14, 18, 20, 22-23, these various formulations of his claim are properly subsumed by the fair trial guarantee implicit within the due process clause. See Smith v. Phillips, 455 U.S. 209, 219 (1982) (prosecutorial misconduct resulting in non-disclosure of potential juror bias analyzed under fair trial guarantee of due process clause).

227 (1954) (evidence that juror had been offered a bribe); the burden of proving the existence of prejudice, said the court, would rest on the defendant. See Smith v. Phillips, 455 U.S. 209, 215-18 (1982) (claim of juror bias); United States v. Hill, 688 F.2d 18 (6th Cir. 1982) (dictionary in jury room); Petitioner's App. at 126A.

With respect to the jury's exposure to the dictionary definition of inference, the Connecticut Supreme Court found no possible prejudice to the defendant based on the following factors: (1) the definition of words used in standard dictionaries is taken as a matter of common knowledge which the jury is supposed to possess; (2) the instructions to the jury, which emphatically cautioned against the drawing of inferences based simply upon a "guess or surmise," amply guarded against the use by the jury of anything but "logical and reasonable

[inferences] well-founded upon the facts" proved. Petitioner's App. at 127A (quoting instructions given); and (3) there was no evidence in the record to rebut the presumption that the jury obeyed these instructions. Petitioner's App. at 127A-128A. A colorable claim that reference to the dictionary definition resulted in the deprivation of a fair trial cannot arise from these facts.

The petitioner's claim with respect to juror experimentation also fails to raise a substantial federal claim worthy of review by this Court. That is so for several reasons: (1) Although the juror conduct was properly disapproved by the Connecticut Supreme Court, it clearly did not involve introduction of any "new evidential fact" into the case; Petitioner's App. at 129A-131A; (2) the experiment tested the theories of the parties and was well within the

bounds of the evidence introduced at trial; Petitioner's App. at 129A, 131A; (3) the experiment was itself suggested by a similar demonstration conducted by defense counsel during the course of the trial; Petitioner's App. at 128A-129A; (4) no claim was made at trial or on appeal that the experiment was somehow intrinsically, or as conducted, unreliable.[2] Petitioner's App. at 130A.

Hence this record cannot support a substantial claim that the experimentation deprived the petitioner of a fair trial. See United States v. Callahan, 442 F. Supp. 1213, 1225-26 (D. Minn. 1978); State v. Thompson, 524 P.2d 1115, 119-20 (Mont. 1974); People v. Harris, 84 App. Div. 2d 63,

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[2] Nevertheless, in his petition, the petitioner claims for the first time in any court that, because the items used in the experiment "differed substantially form the evidence," the experiment was "unreliable." Petition at 26. This claim, factually unsupported, is not appropriate for review, not having been made below. See Hoover v. Ronwin, ___ U.S. ___, 104 S. Ct. 1989, 1998 n.25 (1984); Illinois v. Gates, ___ U.S. ___, 103 S. Ct. 2317, 2321-22 (1983).

445 N.Y.S.2d 520, 546 (2d Dep't 1981); People v. Kurena, 187 Ill. App. 3d 771, 410 N.E.2d 277 (1980). This is especially so in light of the other circumstantial evidence that "so overwhelmingly point[ed] to the [petitioner's] guilt." Petitioner's App. at 132A (opinion of the Connecticut Supreme Court). Cf. Rushen v. Spain, __ U.S. __, 104, S. Ct. 453, 456-57 (1983) (harmless judicial misconduct). Juror misconduct that does not undermine the reliability of the jury verdict simply does not jeopardize the fair trial guarantee. Cf. Smith v. Phillips, 455 U.S. 209, 220-21 (1982) (prosecutorial misconduct).

II. THE PETITIONER'S SANDSTROM CLAIM IS FRIVOLOUS

The petitioner claims that the trial court's instruction that "[e]very person is presumed to intend the natural and necessary consequences of his or her acts" had the

effect of either creating a conclusive presumption of intent or shifting to the petitioner the burden of persuasion on the issue of intent, in violation of the holding of Sandstrom v. Montana, 442 U.S. 510, 524 (1979). But this Court has emphasized that such an instruction violates the Sandstrom holding only when the instruction, viewed with the surrounding language, is cast in mandatory, and not permissive terms. Id. at 517; Ulster County Court v. Allen, 442 U.S. 140, 157 (1979).

Examination of the instructions given here establishes the presumption's permissive and non-mandatory nature. See T. August 7, 1979, at 39-40 ("intention may be inferred from his conduct"; what a person's intention has been is "necessarily very largely a matter of inference"; [t]o draw such an inference is not only a privilege, but it is also the duty of the jury provid-

ed, of course, the inference drawn is a reasonable one"; jury has a "duty to draw all reasonable inferences").

Under the circumstances, no real claim under Sandstrom v. Montana, supra, is tenable here.

III. THE PETITIONER'S CLAIM THAT HIS OPPORTUNITY TO CROSS EXAMINE TWO STATE'S WITNESSES WAS UNCONSTITUTIONALLY RESTRICTED IS ENTIRELY FACT LADEN AND UNIQUE TO THIS CASE, AND FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

The petitioner seeks review of a claim that he was deprived of his confrontation rights when he was prevented at trial from posing several questions to two expert witnesses who testified for the State. One expert witness testified that the bite mark located on the victim's shoulder blade had been made by the petitioner. The other witness testified, in the State's case on rebuttal, that the petitioner could not be

excluded as the person who bit the victim. Petitioner's App. at 110A. The petitioner sought to inquire about (1) one witness' hobby of collecting police accoutrements, thus attempting to show his close relationship to law enforcement authorities; (2) a professional and social relationship between the two witnesses; and (3) the accuracy of the opinion of one witness in another case. Petitioner's App. at 718-19.

As to the first claim, the Connecticut Supreme Court accurately pointed out that the witness' close relationship to the State Police, including his then status as state police surgeon with the rank of captain, had been amply demonstrated by other evidence. Petitioner's App. at 719. The court rejected the second claim on the ground that, while evidence of a relationship between witnesses might have some probative value on the issue of credibility, the

matter would fall within the discretion of the trial court. Petitioner's App. at 220. Given the difference between the testimony of the two witnesses and the ample opportunity the petitioner had to test the reliability of the testimony given, the Supreme Court found neither a constitutional violation nor an abuse of discretion. Petitioner's App. at 111A. The claim to the contrary is without persuasive force.

Finally, the petitioner claims that under the confrontation clause of the Sixth Amendment, he was entitled to ask questions of one expert that would have revealed that his opinion was erroneous in another case. The defendant, who failed to make an offer of proof, as required by state law; see State v. Gooch, 186 Conn. 17, 24, 438 A.2d 867 (1982); never established that the prior opinion was in fact erroneous. Moreover, the inquiry would clearly have required a

lengthy excursion into speculative and collateral matters and may well have resulted in a trial within a trial. The Sixth Amendment does not require such a result. Instead, examination of all of the cross-examination discloses that the jury was given ample basis for testing the reliability of the witness. See Davis v. Alaska, 415 U.S. 308 (1974).

At a minimum, these are fact-laden and unique claims, the review of which would not at all advance the jurisprudential role of this Court. See United States v. Johnston, 268 U.S. 220, 227 (1925) (Holmes, J.) (this Court does not grant certiorari "to review evidence and discuss specific facts").

IV. THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S DECISION TO MITIGATE THE CRIME PROVED FROM MURDER TO MANSLAUGHTER, AND THE QUESTION PRESENTED WAS, IN ANY EVENT, EITHER NOT PROPERLY RAISED BELOW OR IS NOT APPROPRIATE FOR REVIEW BY THIS COURT

The petitioner claims that the jury ought not to have been instructed on the lesser included offense of murder, murder under extreme emotional disturbance, which is classified as manslaughter in the first degree. See Conn. Gen. Stat. § 53a-55(a)(2) (Rev. to 1979). One aspect of the claim, that there was insufficient evidence of extreme emotional disturbance, involves a question of state law and is entirely without basis. The other, that the instruction deprived the petitioner of equal protection of the laws, was never raised below.

While the due process clause requires that there be sufficient evidence of every element of an offense; see Jackson v.

Virginia, 443 U.S. 307, 316 (1979); the interpretation of the elements of a state statute is a question of state law. See Wainwright v. Goode, __ U.S. __, 104 S. Ct. 378, 382 (1983). Thus, it is for the Supreme Court of the State of Connecticut to define the parameters of "extreme disturbance" as that term is used in Conn. Gen. Stat. § 53a-55(a)(2) (Rev. to 1979). This the Court has done. See State v. Elliot, 177 Conn. 1, 7-10, 411 A.2d 3 (1970). Its conclusion that the evidence was sufficient to permit the jury to mitigate the seriousness of the crime charged cannot be impeached.[3]

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[3] As the Connecticut Supreme Court noted:

> The facts that the victim's body contained more than 100 stab wounds and a bite mark made by the defendant, that the defendant had not had much sleep during the time preceding the killing, that on the morning of the killing he was so clearly under the influence of some drug or alcohol, that persons who had never seen him before came to that conclusion, and that he appeared to be in a tense and agitated state would tend to show that the defendant was motivated by more than just a desire to take life. Taking all of these facts into

The petitioner further claims that he was deprived of the equal protection of the laws because a defendant raising his extreme emotional disturbance as an affirmative defense to a charge of murder must provide prior notice to the State; Conn. Prac. Bk. §§ 758, 759 (1978); while the trial court may, at the State's request and without prior notice by the State, instruct the jury on the mitigated crime of manslaughter (murder under extreme emotional disturbance) where the evidence warrants. As the petitioner acknowledges, however; Petition at 13; this claim was mentioned for the first time in the State courts in a motion to reargue, filed after final judgment in the Connecticut Supreme Court. The Court summarily rejected that motion.

> account the jury would have been justified in concluding that the defendant committed the homicide at a time when he was extremely emotionally disturbed.

Petitioner's App. at 122A-123A.

The petitioner's failure to comply with the fundamental and virtually universal rule of appellate procedure that requires parties to identify and brief the claims they seek to make on appeal is without excuse. See Conn. Prac. Bk. §§ 3063, 3060F; Sachem's Head Ass'n v. Lufkin, 168 Conn. 365, 366, 362 A.2d 519 (1975) (failure to brief issue constitutes abandonment). This Court will not issue a writ of certiorari to review claims not properly raised below. Hoover v. Ronwin, __ U.S. __, 104 S. Ct. 1989, 1998 n.25 (1984); Illinois v. Gates, __ U.S. __, 103 S. Ct. 2317, 2321-22 (1983). Moreover, the Connecticut Supreme Court's summary rejection of the claim made in the motion to reargue may properly be sustained on alternate, independent state grounds: failure to comply with the state rules of

court. Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978).[4]

V. THE CONSUMPTIVE TESTING, WHICH OCCURRED PRIOR TO THE PETITIONER'S ARREST, DID NOT DEPRIVE HIM OF ANY DUE PROCESS RIGHTS

The petitioner's final claim is that the testing of blood found on his key ring, which consumed the sample, deprived him of a fair trial and the right to present evidence, protected under the due process

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[4] This claim is also insubstantial on the merits. Where the defendant raises his extreme emotional disturbance as an affirmative defense to a murder charge, it is appropriate for the State to be given advance notice so that it might be prepared to rebut the claim. Where, on the other hand, the affirmative defense is not raised but the evidence adduced at trial would nevertheless support such a finding, it is not so much the State's adversarial interest that is served by submission of the appropriate manslaughter instruction (murder under extreme emotional disturbance); it is, rather, the search for the truth and a verdict that reflects the truth that compels submission of the charge. Moreover, a defendant's extreme emotional disturbance can be the predicate of both an affirmative defense and a lesser included offense; State v. Asherman; Petitioner's App. at 121A; it is clear that the charge of the greater offense, murder, includes within it notice of the lesser offense. Any further notice would be superfluous. There is, under the circumstances, no equal protection violation.

clause of the fourteenth amendment. In resolving this claim, the Connecticut Supreme Court acknowledged the affirmative duty of the State to disclose to a defendant any evidence favorable to him and material to his guilt or innocence. Brady v. Maryland, 373 U.S. 83 (1963); Petitioner's App. at 114A. It went on to adopt the following test with respect to evidence that has been consumed in testing by the State:

> [W]here evidence sought to be disclosed has been functionally destroyed, but was subjected to scientific testing by the state prior to its destruction, a defendant must show that a retest would have been possible and must challenge the state's test results, either by attacking the manner in which the test was conducted or by other evidence.

Petitioner's App. at 115A. Cf. California v. Trombetta, __ U.S. __, 81 L. Ed. 2d 413 (1984) (evidence is material only when it "possesses an exculpatory value that was apparent before the evidence was destroyed,"

and when it is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means").

The standard applied by the Connecticut Supreme Court to the challenged unavailability of evidence necessarily consumed in testing comports with constitutional safeguards. Cf. California v. Trombetta, supra (unnecessary destruction of breath sample following testing by State did not constitute due process violation under the circumstances). Absent some substantial evidence that would impeach the test results, a defendant would simply obtain the windfall suppression of reliable evidence if the rule the petitioner advances were applied. Legitimate protections against the introduction of unreliable evidence would not be involved, since the record would have to establish the reliability of the testing

process, while the truth seeking function of a trial would be severely undermined.

The petitioner failed to satisfy the applicable standard. He never even claimed, much less demonstrated, that a retest would have been possible. That the sample was necessarily consumed in testing was simply never challenged below. Petitioner's App. at 116A. Nor did the petitioner challenge the testing methods used, the competency of the examiner, or even the results of the test. Moreover, the petitioner, who would have sought to establish only that the blood was not that of the victim, offered no evidence to show that the amounts of blood on the key ring were sufficient, if properly tested, to establish blood type.[5] Petitioner's App. at 116A. Under the circumstances,

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[5] The State's test results showed only that the substance on the key ring was human blood. Petitioner's App. at 115A.

the petitioner's claim has no support.[6] See State v. Herrera, 365 So. 2d 399, 401 (Fla. App. 1978) ("the weight of authority in the country is that the destruction of [evidence] unavoidably consumed during chemical testing by a state chemist does not constitute an act of suppression of evidence by the state sufficient to trigger a due process violation"); accord, State v. Atkins, 369 So. 2d 389, 390 (Fla. App. 1979); Partain v. State, 238 Ga. 207, 232 S.E.2d 46-47 (1977); Poole v. State, 291 So.2d 723, 725-26, (Miss. 1974); See v. State, 511 P.2d 1076, 1077 (Alaska 1973); State v. Lightle, 210 Kan. 415, 502 P.2d 834, 836 (1972); see also State v. Clutier, 302 A.2d 84, 89 (Me. 1973).

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[6] While consumptive testing should be performed by the State with notice to the defendant and an opportunity for him to have his expert present, such procedure would only be used when the testing follows the initiation of the defendant's prosecution, which did not occur here. See Conn. Prac. Bk. § 732-38.

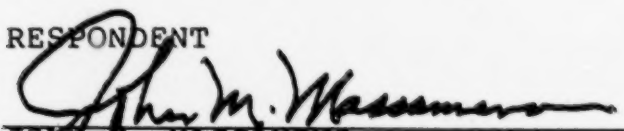
CONCLUSION

For the foregoing reasons, the State of Connecticut urges this Court to deny the petition for a writ of certiorari.

Respectfully submitted.

THE STATE OF CONNECTICUT

RESPONDENT

By: 

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